87-508

No.

Supreme Court, U.S.
FILED
SEP 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE MIAMI HERALD PUBLISHING COMPANY,
Petitioner,

vs.

THE HONORABLE RICHARD BRYAN BURK, LINDA AURILIO, and THE STATE OF FLORIDA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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36 pp

QUESTION PRESENTED FOR REVIEW

Whether the Florida Supreme Court has construed *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), consistently with the First Amendment by adopting a *per se* rule permanently denying the press and public access to unfiled deposition transcripts in criminal prosecutions, even where the defendant objects to the denial of access, and the state makes no claim of "good cause" for the closure.

PARTIES TO THE PROCEEDINGS BELOW

The following is a list of all parties appearing in the proceedings before the Florida Supreme Court:

Petitioners

Palm Beach Newspapers, Inc.
The Miami Herald Publishing Company
The News and Sun Sentinel Company

Respondents

The Honorable Richard Bryan Burk
Linda Aurilio
The State of Florida

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THE HONORABLE RICHARD BRYAN BURK, LINDA AURILIO, and THE STATE OF FLORIDA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner The Miami Herald Publishing Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida entered in the above proceeding.

OPINIONS IN THE COURT BELOW

The opinion of the Supreme Court of Florida in *Palm Beach Newspapers, Inc. v. Burk* ("*Burk*") appears at 504 So.2d 378 (Fla. 1987), and is reprinted in the joint appendix, A. 2-20. The opinion of the Fourth District Court of Appeal in *Palm Beach Newspapers, Inc. v. Burk* appears at 471 So.2d 571 (Fla. 4th Dist. Ct. App. 1985) (*en banc*), and is reprinted in the joint appendix, A. 23-54. The orders entered by the Circuit Court of the Fifteenth Judicial Circuit in *State v. Aurilio* have not been reported. They are reprinted in the joint appendix. A. 55-67.

JURISDICTION

The opinion of the Supreme Court of Florida in *Burk* was entered on February 19, 1987. A Motion for Rehearing was timely filed on March 16, 1987, which motion was denied by the Supreme Court of Florida on April 21, 1987. On July 7, 1987, Justice White ordered that the time for filing this petition for writ of certiorari be extended to and including August 19, 1987. Subsequently, on August 11, 1987, Justice Scalia ordered that the time for filing a petition for writ of certiorari be extended to and including September 4, 1987.

This petition has been filed and docketed within the period established by Supreme Court Rule 29.1. The Court has jurisdiction to review the judgment of the Supreme Court of Florida under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The constitutional provisions and rules involved are:

United States Constitution, Amendment I;

United States Constitution, Amendment XIV, Section 1;

Rule 3.220, Florida Rules of Criminal Procedure;

Rule 1.280(c), Florida Rules of Civil Procedure;

Rule 1.310(f) and (g), Florida Rules of Civil Procedure; and

Rule 1.080(d), Florida Rules of Civil Procedure.

The pertinent text of the foregoing constitutional provisions and rules is reproduced in the Joint Appendix of Petitioners Palm Beach Newspapers, Inc. and The Miami Herald Publishing Company.

STATEMENT OF THE CASE

The State of Florida disposes of approximately 97% of its criminal prosecutions without trial.[1] Consequently, Florida's criminal justice system may be fairly characterized as primarily a pretrial process, and press access to that process is essential for the public to understand and monitor its workings.

Perhaps the major factor contributing to Florida's high rate of pretrial dispositions is the broad discovery right afforded its criminal defendants. Criminal defendants are granted the opportunity to take discovery and conduct depositions in a manner closely analogous to the procedure afforded civil litigants by the Federal Rules of Civil Procedure. Specifically, Rule 3.220, Florida Rules

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1. According to figures provided by the Florida Supreme Court Summary Reporting Service and compiled by the State Court Administrative Office, in recent years, more than 95% of criminal dispositions occurred without trial:

DISPOSITION	CIRCUIT COURT STATEWIDE			COUNTY COURT STATEWIDE		
	1982	1983	1984	1982	1983	1984
Total Defendants Accused	157,640	154,750	163,604	346,752	331,611	348,354
Total Cases Disposed	153,333	149,615	151,723	303,009	322,047	310,108
Total Cases Tried	4,817	4,831	3,761	12,533	11,263	9,280
Total Cases Disposed without trial	148,516	144,784	147,962	290,476	310,784	300,828
Percentage of disposed cases without trial	96.86%	96.77%	97.5%	95.86%	96.5%	97%

of Criminal Procedure, permits criminal defendants to depose the witnesses for the state and to ask them a wide range of questions. Protective orders are available for the same reasons and to the same extent as in civil proceedings. The primary difference between the Florida criminal rule and its federal civil counterpart is that the Florida process is optional. Defendants may, but are not required to, invoke discovery. The state is permitted reciprocal discovery only in the event the defendant exercises his option.[2]

Since few Florida criminal cases proceed to trial, journalists for *The Miami Herald* have come to depend heavily on the sworn testimony presented in depositions to report fully and accurately on prosecutions of legitimate public concern.[3] The Florida criminal deposition is fre-

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2. At least five other states permit criminal defendants similarly expansive discovery rights. *See, e.g.*, Ind. Code § 35-37-4-3; Rule 12, Iowa R.Crim.P.; Rule 25.12, Mo. R.Crim.P.; Rule 15, N.D. R.Crim.P.; N.H. Rev. Stat. Ann. § 517:13.

3. Prior to *Burk*, Florida trial judges repeatedly had held that members of the press enjoyed a qualified right to both attend depositions taken in criminal cases and inspect transcripts. *See, e.g., Florida v. O'Dowd*, 9 Media L. Rep. 2455 (BNA) (Fla. 18th Cir. Ct. Oct. 13, 1983) (Mize, J.); *Florida v. Tolmie*, 9 Media L. Rep. 1407 (BNA) (Fla. 15th Cir. Ct. March 3, 1983) (Cook, J.); *Florida v. Reid*, 8 Media L. Rep. 1249 (BNA) (Fla. 15th Cir. Ct. March 8, 1982) (Goldman, J.); *Florida v. Sanchez*, 7 Media L. Rep. 2338 (BNA) (Fla. 15th Cir. Ct. Nov. 17, 1981) (Mounts, J.); *Florida v. Hodges*, 7 Media L. Rep. 2424 (BNA) (Fla. 20th Cir. Ct. Dec. 21, 1981) (Pack, J.); *Florida v. Alford*, 5 Media L. Rep. 2054 (BNA) (Fla. 15th Cir. Ct. Oct. 19, 1979) (Mounts, J.); *Florida v. Diggs*, 5 Media L. Rep. 2597 (BNA) (Fla. 11th Cir. Ct. March 4, 1980) (Nesbitt, J.); *Florida v. Bundy*, 48 Fla. Supp. 205 (Fla. 2d Cir. Ct. Apr. 26, 1979) (Cowart, J.). Civil depositions were likewise presumed open in Florida prior to *Burk*. *Withlacoochee v. Seminole Electric*, 1 Fla.Supp.2d 1377, 8 Media L. Rep. 1281 (BNA) (Fla. 13th Cir. Ct. March 11, 1982) (Miller, J.); *Cazarez v. Church of Scientology*, 6 Media L. Rep. 2109 (BNA) (Fla. 6th Cir. Ct. Oct. 31, 1980) (Bryson, J.); *Johnson v. Broward County*, 7 Media L. Rep. 2125 (BNA) (Fla. 17th Cir. Ct. Oct. 22, 1981).

quently the only evidentiary predicate for dismissals, plea bargains, *nolle prosequi* and guilty pleas. And, since Florida has abandoned the elaborate public preliminary hearing procedure characteristic of states like California,[4] depositions are typically the only source of information about these pretrial dispositions. This reliance on deposition testimony proceeded for years largely without comment or moment[5] because transcripts were routinely filed in the public court file pursuant to both practice and the rules. It was not until Florida's adoption of new "housekeeping" rules, designed to "relieve the document storage burden" all courts began to experience in the last decade, that parties no longer filed deposition transcripts as a matter of course.[6]

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4. In *Press-Enterprise Co. v. Superior Court,* ..... U.S. ....., 106 S.Ct. 2735 (1986) (*"Press-Enterprise II"*) this Court recognized a First Amendment right of access to California type criminal preliminary hearings. Prior to its adoption of the criminal discovery rules in 1972, Florida utilized an elaborate preliminary hearing process in which defendants were permitted to call witnesses and to cross-examine those called by the state. *See* Rule 1.22, Florida Rules of Criminal Procedure (1968). Florida affords this process today only in cases in which an indictment or information is not filed within 21 days of arrest. Defendants typically depend on Florida's expansive discovery process to learn the information formerly available through the preliminary hearing.

5. Throughout this period, only three cases involving deposition access reached the Florida appellate courts, and each affirmed the qualified right to monitor the deposition process. *See Ocala Star Banner Corp. v. Sturgis,* 388 So.2d 1367 (Fla. 5th Dist. Ct. App. 1980); *Sentinel Star Co. v. Booth,* 372 So.2d 100 (Fla. 2d Dist. Ct. App. 1979); *Tallahassee Democrat, Inc. v. Willis,* 370 So.2d 867 (Fla. 1st Dist. Ct. App. 1979).

6. *See In re Florida Rules of Civil Procedure,* 403 So.2d 926, 930 (Fla. 1981) (adopting Rule 1.310(f) to restrict the filing requirement "in an effort to relieve the document storage burden now experienced by all segments of Florida's court system"); *see also* Rule 5(d), Federal Rules of Civil Procedure, Notes of Advisory Committee, 1980 Amendment ("large volume of discovery filings presents serious problems of storage . . . but such materials are sometimes of interest to those who may have no access to them except by a requirement of filing").

While the document filing rules were never intended to diminish substantive public access rights, they have had just this consequence in Florida. In fact, as *Burk* and the two companion cases described herein[7] amply demonstrate, these rules have provided the opportunity for the parties to a criminal prosecution, or even the state acting alone, to control public knowledge of the criminal action by manipulation of the filing rule. Worse yet, the Florida court has adopted a *per se* rule precluding the press from ever inspecting any unfiled depositions where either party to the criminal prosecution objects to access, even should the defendant want public access and the state offer no reason, let alone "good cause," for a permanent closure.

A. Miami Herald Publishing Company v. Burk

On September 20, 1982, Linda Aurilio ("Aurilio") was charged with the attempted murder of her husband Carl. Public concern for the prosecution was great because Aurilio was a key witness for the state against her husband, nine other persons, and several government officials in a multi-million dollar bookmaking operation.

Shortly therafter, Aurilio's counsel—a court-appointed public defender—invoked discovery and scheduled the depositions of the state's witnesses. Notices of deposition

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7. The two companion cases are *Miami Herald Publishing Co. v. Hagler*, 506 So.2d 1037 (Fla. 1987) (*"Hagler"*) and *Palm Beach Newspapers, Inc. v. State*, 506 So.2d 1037 (Fla. 1987) (*"State"*). The Florida Supreme Court accepted jurisdiction in these two cases and they were fully briefed in that court. However, the court summarily disposed of them, explicitly on the basis of *Burk*, by denying review. Consequently, *Hagler* and *State* could not be consolidated with *Burk* in this petition. *See* Rule 19.4, Rules of the Supreme Court. A second, but in all pertinent respects identical, consolidated petition has been filed in *Hagler* and *State* simultaneously with this petition. For the Court's convenience, the facts of all three cases are included in both petitions. The Miami Herald respectfully requests that the Court consider the two petitions together.

were properly filed with the clerk of the court. Because of the public interest in the case, a reporter for the *Fort Lauderdale News and Sun-Sentinel* arrived at the first scheduled deposition and indicated that he wished to attend. The state attorney and Aurilio's public defender agreed to suspend the deposition so the state could seek a court order barring the press and public from all future depositions in the case.

Subsequently, the prosecution filed a "motion for protective order" excluding the press and public from attending the depositions and sealing the transcripts of all depositions. Defense counsel refused to join in the state's motion but indicated he had no objection to it, and counsel for the press intervened and opposed the motion. No party offered any evidence in support of the motion for protective order. Thus, Judge Rodgers denied the state's motion without prejudice stating:

> Certainly I would be in error to just issue a blanket rule that no depositions in this case are open to the press. (Hearing, December 2, 1982, at 30).

See A. 66-67. It was agreed that if a particular problem relating to press access arose during the depositions, the parties could return to the court at that time.

But the opportunity to return never arose. In an effort to circumvent the court's order, the state attorney and defense counsel agreed to take the depositions without filing the proper notices with the clerk of the court. Upon learning of the unnoticed depositions, the press requested copies of the transcripts of the depositions from the state attorney, defense counsel, and the court reporter.

The state attorney and the court reporter refused the request. Defense counsel, however, filed a "motion

to determine defendant's sixth amendment rights, to determine status of transcripts under Florida law and to prevent further harassment by press." A hearing was held on the motion, and, as before, no evidence in support of closure was presented. Notwithstanding this fact, on January 18, 1983, Judge Rodgers receded from his prior order and ruled that the parties could exclude the press from the depositions without showing "good cause" provided no judicial process was involved, other than the issuance of a subpoena. A. 61-65.

On February 9, 1983, the press again moved to obtain access to the depositions in the Aurilio case. By this time the case had been reassigned to the Honorable Richard Bryan Burk. At a hearing on the motions, defense counsel indicated that she and the state attorney had "stipulated" that if the depositions were open and the information disclosed published, "it would be impossible to have a fair trial in Palm Beach County." No evidence was offered in support of this "stipulation." In an order dated February 11, 1983, Judge Burk held that the press could not attend the depositions in the case, but that the transcripts of all depositions would have to be released unless a party obtained a court order to seal those portions of the depositions deemed "objectionable." A. 58-60.

The press filed a motion to reconsider that part of the order which prohibited attendance at the depositions, asserting a qualified right to attend based on constitutional provisions, common law precedent, and the language of relevant court rules. Another hearing was held, and again neither the state nor the defense offered any evidence in support of closure. Instead, they argued that no reason, let alone "good cause," need be presented to

deny the press access to the depositions. On February 28, 1983, Judge Burk not only denied the motion, he rescinded that part of his earlier order which required the release of all deposition transcripts not specifically ordered sealed. A. 55-57.

The press immediately petitioned for review of this order in the appellate court. On June 11, 1985, more than two years after appellate argument to a three-judge panel, the Fourth District Court of Appeal rendered a fragmented 5-4 *en banc* decision. A. 23-54. Writing five separate opinions, a bare majority ruled the press had *no* right of access to depositions or unfiled transcripts. However, the court certified two questions to the Supreme Court of Florida for resolution as being of "great public importance":

> 1. Is the press entitled to notice and the opportunity and right to attend pretrial discovery depositions in a criminal case?
>
> 2. Is the press entitled to access to pretrial discovery depositions in a criminal case which may or may not have been transcribed but which have not been filed with the clerk of court or the judge?

A. 41.

The Florida Supreme Court immediately accepted jurisdiction. On February 19, 1987, again after almost two years of deliberation, a bare majority affirmed the decision of the Fourth District Court of Appeal, 4-1.[8]

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8. The term "bare majority" is used advisedly. Under Florida law, a majority of the court must consist of at least four justices. Due to the court's extraordinary delay in rendering its decision, only four justices remained on the court who had

(Continued on following page)

A. 2-20. Relying on a purported interpretation of this Court's decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), the Florida court held that "the press does not have a first amendment right . . . to obtain copies of depositions which are not filed with the court."[9] A. 11. The court explicitly acknowledged the factual differences between *Seattle Times* and the case before it but nonetheless held:

> [W]e believe the rationale of *Seattle Times* is applicable to criminal prosecutions and to the issue of access by non-parties to discovery proceedings and is consistent with *Gannett*, *Richmond Newspapers*, *Press-Enterprise I*, *Waller*, and *Press-Enterprise II*.

A. 12.

The court explicitly rejected the straightforward application of the *Seattle Times* rationale made by the press petitioners, that parties seeking to limit public access to unfiled discovery materials must show "good cause" and obtain a protective order to do so. Instead, the court interpreted *Seattle Times* to hold that the public and press

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Footnote continued—

participated in the oral argument and reviewed the briefs. One of these justices chose to dissent. To obtain a majority, retired Justice Adkins, who had been on the court at the time of argument, joined the majority. None of the three justices who had joined the Court after argument, but prior to issuance of this decision, participated. Justice Barkett recused herself because she had dissented from the *en banc* decision of the Fourth District.

9. The Florida Supreme Court also held that the press enjoys no qualified right to *attend* discovery depositions taken in criminal cases. The Miami Herald seeks no review of this holding in this petition. Consequently, the concerns expressed in the *Burk* opinion regarding the inability of parties to anticipate testimony given at discovery depositions are not relevant to this petition, since a motion to limit access to a deposition transcript requires no predictive skills.

have no right of access to such discovery materials, regardless of whether the action is civil or criminal, or whether "good cause" exists for the denial:

> In our view, *Seattle Times* furnishes guidance applicable to the case at hand. Properly read, the defendant Seattle Times should be regarded as wearing two hats. In its role as defendant, it was entitled to the liberal discovery right of a party.
>
> * * *
>
> In its role as a newspaper, the Seattle Times was treated as a non-party to the suit and had no independent constitutional right to have access to the discovery process or to use the information which it discovered in its role as a party. Essentially, the protective order denied Seattle Times, in its role as a newspaper, access to the discovery process.
>
> Petitioners cite *Seattle Times* for the proposition that parties who wish to deny access to a deposition proceeding should be required to obtain a protective order. We disagree. Because the Seattle Times was treated as both a party and a non-party and thus had access to information which it discovered as a party, it was necessary for the trial court to issue a protective order. Absent its party status Seattle Times was accorded no independent first amendment right to the discovery process or to discovered information. Given this holding, we do not see how it can be plausibly argued that the press has a first amendment right to be present at deposition proceedings or to obtain access to such depositions prior to their being introduced at trial or become the subject of a suppression hearing.

A. 13-14.

All motions for rehearing were denied on April 21, 1987.

B. Miami Herald Publishing Company v. Hagler

John Hagler ("Hagler") was arrested in Riviera Beach, Florida, in the course of a major undercover "sting" operation and charged with possession and sale of one-half gram of cocaine to a police informant. Pursuant to Rule 3.220, Florida Rules of Criminal Procedure, Hagler's counsel took the deposition of the informant. No one objected and the press attended without incident.

At the deposition, the informant testified that prior to selling him the cocaine, Hagler had offered to sell him pictures of Palm Beach County State Attorney David Bludworth and an unidentified woman. Hagler explained that the pictures could be used as "bargaining chips" to influence Bludworth, who was then campaigning for the United States Senate.

On August 1, 1983, Hagler's counsel noticed the deposition of the state attorney for August 16, and, on August 4, a subpoena was served on Bludworth. On August 15, the press learned that the deposition had been cancelled. Hagler's counsel advised the press that he had reached an agreement with the state attorney not to reveal when or where the deposition would be rescheduled. Thus on August 29, 1983, the deposition of David Bludworth was taken in secret. No amended notice of deposition was filed, and no protective order was sought or obtained.

Shortly thereafter, on September 1, 1983, the press filed a motion seeking an order allowing them access to the transcript of the Bludworth deposition and requiring all future depositions in the case to be held in the open. On September 6, Judge Harper orally denied the motion.

The press moved for reconsideration and this too was denied, by written order dated September 12, 1983. A. 74-83.

Thereafter, on September 27, 1983, the press sought emergency review of the order in the Fourth District Court of Appeal.[10] And, on June 26, 1985, a panel of the court ultimately affirmed Judge Harper's order denying access to the transcript of the state attorney's secret deposition. A. 72-73. The panel relied solely on the recent *en banc* decision in *Burk*.

The press petitioners timely sought review of the Fourth District decision in the Supreme Court of Florida, which accepted jurisdiction on January 21, 1986. On May 7, 1987, the Supreme Court of Florida summarily denied the petition for review, holding that its recent decision in *Burk* "obviate[d] jurisdiction." A. 70-71.

C. Miami Herald Publishing Company v. State

Dr. John Freund and John Trent were charged with first-degree murder in connection with the death of Ralph Walker in July, 1984. Defense counsel for Freund and Trent noticed the depositions of four state witnesses for January 30, 1985, pursuant to Rule 3.220, Florida Rules of Criminal Procedure. Members of the press appeared for the depositions.

Before testimony could begin, however, the assistant state attorney handling the case objected to the presence of the press. He indicated that if the press stayed, he would instruct the witness not to answer. Defense counsel, however, objected to "clos[ing] the doors and pro-

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10. While the appeal was pending, Hagler pled guilty and was convicted of the charge of selling cocaine. Sentence was withheld pending Hagler's successful completion of three years probation. Thereafter, on December 13, 1983, Hagler voluntarily released the transcript of the Bludworth deposition to the press.

ceed[ing] without the press." They insisted that the depositions proceed with the press in attendance. Ultimately, the assistant state attorney announced his intention to seek a protective order and the deposition was suspended. A. 92.

That afternoon, the state moved for a protective order and the defendants moved to compel the state to proceed with discovery. A hearing was held before Judge Mounts during which the state conceded that it had no factual basis for its claim that press coverage would frighten its witnesses. Judge Mounts recessed the hearing to permit the parties to brief their arguments. On February 15, 1983, a second hearing was held. Again, the state offered no evidence in support of closure, and counsel for defendant Trent repeated his "object[ion] to the press being excluded from these depositions." A. 92.

On February 22, 1985, Judge Mounts entered an order denying the state's motion, and noting that the state had failed to offer any reasons why the press should be excluded from the depositions. A. 91-94. The depositions in the case continued to be taken with the press in attendance.

On March 21, 1985, the state petitioned the Fourth District Court of Appeal for review of Judge Mounts' order. Neither defendant filed a brief. On July 31, 1985, a panel of the court summarily reversed the trial court. A. 88-90. The panel relied solely on the recent *en banc* decision in *Burk*.

The press timely sought review of the Fourth District decision in the Florida Supreme Court, which granted review on February 7, 1986. On May 7, 1987, the Supreme Court of Florida summarily denied the petition for review, holding that its recent decision in *Burk* "obviate[d] jurisdiction." A. 86-87.

REASONS FOR GRANTING THE WRIT

I.

Three years ago, in *Seattle Times Co. v. Rhinehart, supra,* this Court first addressed the relationship between First Amendment rights and court rules authorizing protective orders restricting civil litigants' dissemination of information obtained solely through the use of judicial discovery procedures. The decision wrought a delicate balancing of the state's interest in preventing discovery abuses and facilitating the efficient litigation of civil disputes on one hand, and the free speech interests of litigants on the other.

The Court was careful to note that the protective order under review had been entered for "good cause," in accordance with the state rules of procedure. The plaintiff Aquarian Foundation had made a strong evidentiary showing that the protective order should be entered to preserve the anonymity, and thereby the important privacy and First Amendment rights, of its members and contributors. Filed affidavits showed that the unpopularity of the Aquarian sect had subjected known members to vandalism and retaliation for their beliefs. The trial court permitted discovery into these matters, but found "good cause" to limit the defendant's right to disclose this highly protected information obtained solely through the judicial process. This Court concluded that court rules providing for such protective orders upon a showing of "good cause" do not violate the First Amendment because they serve a substantial governmental interest unrelated to the suppression of speech and are appropriately tailored to protect that interest.

In the years since *Seattle Times*, the state and lower federal courts have attempted to apply its teachings in a variety of contexts that are greatly removed from the narrow case of gratuitous disclosure of highly protected confidential information obtained by a civil litigant through court-ordered discovery. The cases often concern criminal prosecutions, not civil litigation. They therefore raise important issues unrelated to the manner in which private disputes are litigated in the courts. Even more troubling, the cases very frequently involve the public's right to monitor and understand our system of civil and criminal justice rather than a party's self-interested desire to disseminate irrelevant private information obtained through discovery.

More technical distinctions are also found in the cases. Access claims may involve either filed or unfiled materials, and the access right may be asserted both post-judgment and pre-judgment. *See, e.g., In re Reporters' Committee for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985) (no First Amendment right of access *prejudgment* to civil discovery documents filed with the court). The grounds recognized for the qualified access right have included the common law, court rules, state constitutional provisions, and the First Amendment.

Efforts to apply *Seattle Times* to these cases have been problematic since the case involved neither an access claim, nor a criminal prosecution. *See Reporters' Committee*, 773 F.2d at 1331 (*Seattle Times* is "more remote in that it did not invoke a claim by the public to *access*, but rather a claim by one of the parties to *disseminate* information acquired in the course of pretrial discovery") (Scalia, J.). The materials which were the subject of the protective order in *Seattle Times* were not filed with the court, and the right to disseminate them gratuitously was restricted prior to entry of judgment.

The Florida Supreme Court's opinion is the most far-reaching limitation of the public's First Amendment right of access to be based on *Seattle Times*. The Florida court squarely held that its "conclusion that the press does not have a first amendment right . . . to obtain copies of depositions which are not filed with the court finds support in *Seattle Times Co. v. Rhinehart.*" A. 11 (citation omitted). Relying on *Seattle Times* to "furnish[ ] guidance," A. 13, the Florida Supreme Court held that the press and public have absolutely no right of access to unfiled deposition transcripts, irrespective of whether "good cause" for closure is alleged (much less shown), whether the defendant objects to the denial of public access, or even whether judgment has been entered in the case. In short, the Florida court expressly attributed its expansive holding to the opinion of this Court in *Seattle Times*.

The crux of the *Burk* opinion is the Florida court's assertion that as a *party litigant*, the Seattle Times was allowed discovery into the Aquarian Foundation's confidential information, but that "as a newspaper, the Seattle Times was treated as a non-party to the suit and had no independent constitutional right to have access to the discovery process." A. 13.

The flaws in this reading of *Seattle Times* are apparent. This Court's opinion nowhere states or implies that the press and public have no right to monitor the criminal discovery process, and it nowhere holds or suggests that the Seattle Times' rights were solely those of a litigant. The order affirmed in *Seattle Times*, by its express terms, *did not limit public access to information relevant to litigation of the case.* The Court's careful balancing of interests has been converted by the Florida court into a *per se* rule of closure which finds no support in the actual language of the opinion, and is clearly con-

trary to its rationale. The *per se Burk* closure rule, unlimited in scope or duration, serves no interest unrelated to the suppression of speech and is not narrowly drawn to serve a substantial governmental interest.

If the *Burk* rule were the isolated decision of a single state court, guidance from the Court on this issue would be of "great public importance" only to the people of Florida. However, the *Burk* rule has been explicitly followed by the highest state courts of both Michigan and Arizona. *Booth Newspapers, Inc. v. Midland Circuit Judge,* 145 Mich.App. 396, 377 N.W.2d 868 (Mich.Ct. App. 1985), *leave to appeal denied,* 425 Mich. 854 (Mich. 1986), *cert. denied,* 107 S.Ct. 877 (1987) (no standing); *Lewis R. Pyle Memorial Hospital v. Superior Court,* 149 Ariz. 193, 717 P.2d 872, 876 (Ariz. 1986) (citing *Burk*). And the position of these courts is analogous to that of the Tenth Circuit Court of Appeals which has held the press has no standing to seek access to unfiled civil discovery materials. *Oklahoma Hospital Association v. Oklahoma Publishing Co.,* 748 F.2d 1421 (10th Cir. 1984), *cert. denied,* 473 U.S. 905 (1985).

These decisions, however, conflict with opinions of many other important appellate tribunals. For example, the Rhode Island Supreme Court has decided that the press enjoys a qualified First Amendment right of access to discovery materials produced in a state criminal action. *See State v. Cianci,* 496 A.2d 139, 144-45 (R.I. 1985). At least six United States Circuit Courts of Appeals have construed *Seattle Times* to hold that third parties do enjoy a qualified access right to discovery materials, although their rationales and the circumstances of their decisions vary. Some of these cases involve the public's right to monitor some of the most important "public law"

cases of this era. *In re "Agent Orange" Product Liability Litigation,* 821 F.2d 139 (2d Cir. 1987) (requiring "good cause" to maintain seal on civil discovery documents designated "confidential" pursuant to blanket protective order in Vietnam veterans' suit for injuries caused by "Agent Orange" chemicals); *In re Alexander Grant & Co. Litigation,* 820 F.2d 352 (11th Cir. 1987) (requiring "good cause" to prevent press access to unfiled discovery documents in suit concerning massive fraud by government securities broker); *Anderson v. Cryovac, Inc.,* 805 F.2d 1 (1st Cir. 1986) (requiring "good cause" to seal civil discovery documents submitted to the court in support of motions in toxic waste case); *Cipollone v. Liggett Group, Inc.,* 785 F.2d 1108 (3d Cir. 1986) (requiring "good cause" to seal non-confidential civil discovery documents in products liability case against tobacco companies); *Worrell Newspapers of Indiana, Inc. v. Westhafer,* 739 F.2d 1219, 1223 n.4 (7th Cir. 1984) (reciting that *Seattle Times* permits the entry of a protective order for "good cause" shown in the context of pretrial civil discovery); *Tavoulareas v. Washington Post Co.,* 737 F.2d 1170, 1172-73 (D.C. Cir. 1984) (remanding for determination of whether the continuation post-judgment of a protective order sealing deposition transcripts is supported by "good cause"); *United States v. Smith,* 602 F.Supp. 388 (M.D. Pa. 1985), *aff'd,* 776 F.2d 1104 (3d Cir. 1985) (requiring "good cause" to restrict public access to a bill of particulars deemed to be criminal discovery). *See generally* D. Paul and R. Ovelmen, "Access," in Communications Law 1986, 740-58 780-808 (PLI 1986) (collecting additional conflicting cases).

In fact, journalists in Florida face this conflict squarely every day in trying to cover judicial proceedings in the state and federal courts. As a consequence of the decisions of the Eleventh Circuit in *Alexander Grant* and the Florida

Supreme Court in *Burk*, *Hagler*, and *State*, the press enjoys a qualified right of access to discovery materials produced in federal court, but no similar right in state civil or criminal actions.

This Court can provide critically needed guidance on the application of *Seattle Times* to public access claims in criminal cases and in so doing resolve the conflicts among the many cases addressing the public's right to monitor the discovery process.

II.

In a series of decisions culminating in *Press-Enterprise II*,[11] this Court has developed the contours of a qualified First Amendment right of access. In a sweeping departure from these fundamental First Amendment precedents, the Florida Supreme Court has abandoned the central access teachings of this Court and thereby deprived the people of Florida of a crucial source of information about their criminal justice system.

In considering whether the First Amendment right of access applies to particular judicial records or proceedings, this Court has looked to two complementary considerations. "First, because a tradition of accessibility implies the favorable judgment of experience," the Court has "considered whether the place and process has been open to the press and general public." *Press-Enterprise II*, 106 S.Ct. at 2740. Second, the Court has "considered whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*

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11. *Waller v. Georgia*, 467 U.S. 39 (1984); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*"Press-Enterprise I"*); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (*"Globe Newspaper"*); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (*"Richmond Newspapers"*); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

The Florida Supreme Court addressed neither issue. Instead of considering Florida's actual experience with unsealed criminal deposition transcripts, the court simply recited dicta from *Seattle Times* stating that "deposition proceedings are not public components of a *civil trial.*" A. 13 (citation omitted) (emphasis added). That Florida *never had* a rule against public access to *criminal depositions,* and that the press had actually attended many criminal depositions since the inception of the discovery rules, were facts of no import to the court.[12]

Similarly, the *Burk* court never considered the structural importance of public access to the criminal deposition process. Such access is crucial for the public to understand Florida's criminal justice system, a system in which depositions provide the sole source of sworn testimony in the vast majority of criminal cases since fewer than 3% of such cases go to public trial. The court offered no assessment of the need for access in these cases, or of

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12. Whether discovery proceedings have historically been closed to the public is an issue that deserves far greater attention from this Court. Substantial historical evidence exists that depositions under the common law, although rare, did occur and were open to the public at the discretion of the presiding magistrate or "Examiner," not of the parties. Daniell, Chancery Pleading and Practice, Vol. I, 906 (6th Am. Ed. 1894) ("The Examiner has power to admit or exclude the public, as he thinks fit."); *Wright v. Wilkin,* 4 Jur.N.S. 804, 805 (1885) ("As to the public or the short-hand writer, I think the examiner has power to do just as he thinks fit; if he imagines that he is precluded from admitting any persons except the parties, their legal advisers, and the witnesses, I think he is not right."). The Daniell treatise was followed in the leading Florida treatise on the subject. R.H. Armstrong and W.P. Donahue, Florida Chancery Jurisprudence § 334 (1927) ("The examination of witnesses may be conducted in public or private, as the officer may determine."). By statutory mandate, Florida courts of the period were required to observe English practice where, as here, Florida and federal rules were silent. Act of Nov. 7, 1828, § 35 (1881); *Long v. Anderson,* 48 Fla. 27, 37 So. 216, 219 (1904).

But see Reporters' Committee, supra.

the public benefit that access to the deposition process would provide. Consequently, the Florida court departed from this Court's access tenets in at least three fundamental ways.

First, it is clear, and it was argued, that each of the First Amendment interests supporting access to criminal trials identified by this Court in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980), apply with equal force to access to unfiled deposition transcripts in Florida's largely pretrial criminal justice system. Each of the interests served by access to trials—"fairness," "the perception of fairness," "public understanding of the rule of law" and the case at hand, the "community therapeutic value" of observing the process, the deterrence of wrongdoing, and the communication of information relevant to informed discussion of the system; *id.* at 570-73—is served by access to criminal depositions. Indeed, the interests served by access to trials can *only* be served by access to criminal depositions in Florida, since the deposition often provides the only meaningful avenue of public access to the process. Criminal depositions frequently form the only evidentiary predicate for dismissals, plea bargains, *nolle prosequi,* and guilty pleas. As this Court recognized in relation to California's preliminary hearing in *Press-Enterprise II,* a procedure which provides "the sole occasion for public observation of the criminal system" must be open to public view. *Press-Enterprise II,* 106 S.Ct. at 2743, *quoting, Richmond Newspapers,* 448 U.S. at 572.

In addition, the *Burk* rule raises serious Sixth Amendment concerns. As the Court noted in *Press-Enterprise II,* "[t]he right to an open trial is a shared right of the accused and the public, the common concern being the assurance of fairness." *Press-Enterprise II,* 106 S.Ct. at

2740; *see Waller v. Georgia*, 467 U.S. 39 (1984). It is at this juncture that the Sixth Amendment rights of the criminal defendant and the First Amendment rights of the public are coextensive. The *Waller* Court observed that the need for open suppression hearings "may be particularly strong" because "[a] challenge to the seizure of evidence frequently attacks the conduct of police and prosecutor." 467 U.S. at 47. The *Burk* rule, because it grants the prosecution the power to close an unfiled deposition even when the defendant objects, as he did in *State*, presents a clear threat to the fundamental constitutional rights of both criminal defendants and the public.

Finally, the Florida Supreme Court has judicially created a rule against access which is as absolute as the mandatory closure statute invalidated by this Court in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (*"Globe Newspaper"*). This Court has consistently stated the adjudication of access claims requires a rule which will accommodate competing interests; consequently, *per se* or mandatory closure rules are inappropriate. As the Court noted in *Globe Newspaper, supra*, at 608, even a "compelling" interest "does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest." The locus of authority to make decisions regarding access is the trial judge who must articulate specific findings to support closure on a case-by-case basis; it is not the parties acting in their own narrow self-interest. *Id.* Moreover, particular closure orders must be narrowly tailored to serve compelling or overriding state interests. *Press-Enterprise II*, 106 S.Ct. at 2743; *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (*"Press-Enterprise I"*); *Globe Newspaper*, 457 U.S. at 606-07.

The *Burk* rule satisfies none of these requirements. It is an absolute *per se* rule which does not permit the accommodation of competing interests. The traditional authority of the trial court to decide public access claims is replaced by the whim of a single party. No compelling state interest was presented to justify the imposition of this *per se* closure rule. That *some* depositions may contain particular private or prejudicial information does not justify a rule that seals *all* unfiled depositions irrespective of whether they contain any sensitive information. Similarly, the fact that a deposition's premature disclosure may prejudice a defendant's fair trial rights fails to support a closure rule which imposes a seal that cannot be broken, even after disposition of the case. *See Press-Enterprise I*, 464 U.S. at 512.

CONCLUSION

Whether considered in light of *Seattle Times* or this Court's First Amendment access cases, the decision of the Florida Supreme Court is in error and signals the widespread need for guidance by this Court. The issues presented below were certified to be of "great public importance" to the people of Florida. They received *en banc* consideration by two different intermediate Florida appellate courts as well as by the Florida Supreme Court.[13] After years of deliberation, bare ma-

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13. The Third District Court of Appeal also considered the question addressed in *Burk en banc*. *Estrada v. Snyder*, Case No. 86-767 (Fla. 3d Dist. Ct. App. 1986). The judges in that court split 7-2 *in favor* of recognizing a qualified right of access. The Third District likewise certified the question to the Florida Supreme Court. In the wake of *Burk*, however, the Florida Supreme Court declined jurisdiction. *Miami Herald Publishing Co. v. Estrada*, Case No. 68,625 (Fla. 1987).

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jorities emerged to issue the highly controversial opinion which is the subject of this petition. During this period, the people of Florida have been deprived of crucial information concerning their criminal justice system. Not only have Florida judges issued conflicting opinions, but the rule of *Burk* has been both followed and contradicted in cases throughout the country. In light of the significance of this issue, and the pronounced conflicts among the circuits in deciding it, we respectfully submit that this Petition for a Writ of Certiorari be granted.

DATED: Miami, Florida
September 4, 1987

Respectfully submitted,

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Footnote continued—

While *Burk* was pending in the Fourth District, a unanimous panel of the Second District Court of Appeal also affirmed the qualified right of access to criminal depositions applying the "good cause" standard. *Short v. Gaylord Broadcasting Co.*, 462 So.2d 591 (Fla. 2d Dist. Ct. App. 1985).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the Petition for Writ of Certiorari in this case was originally served on September 4, 1987, and that the foregoing corrected Petition for Writ of Certiorari was served on September 25, 1987, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States post office or mailbox, with first-class postage prepaid, addressed to:

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